No. 95-210

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE THE NATIONAL BROILER COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae the National Broiler Council will address the following question:

Did the divided Court of Appeals for the Fourth Circuit err in concluding, along with the Eighth Circuit, that chicken catchers, forklift operators, and live-haul drivers who catch, cage, and load live chickens on a farm for transportation to a producer's storage facility are not engaged in work "on a farm as an incident to or in conjunction with * * * farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market," 29 U.S.C. § 203(f), and are therefore not agricultural laborers, contrary to the law in the Fifth, Ninth, and Eleventh Circuits?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Organized in 1954, the National Broiler Council ("NBC") is a national trade association representing the producers and processors of more than 95 percent of the broiler/fryer chicken consumed in the United States. NBC and its 225 member companies have a vital interest in the fifth question presented by petitioners: whether

employees of vertically integrated poultry producers who perform the tasks on a farm of catching, caging, loading, and transporting live chickens are properly classified as agricultural laborers exempt from certain requirements of the National Labor Relations Act ("NLRA")—as they are in the Fifth, Ninth, and Eleventh Circuits—or instead as employees fully subject to the NLRA—as they are in the Fourth and Eighth Circuits. The vast bulk of the operations of NBC member companies are in the States covered by these five Circuits, and the activities of the chicken catchers, forklift operators, and live-haul drivers at issue in this case are typical of the operations of a vertically integrated poultry producer. The conflict among the Circuits thus concerns a question of great practical significance to NBC members that is ripe for resolution by this Court.[1]

STATEMENT OF THE CASE

The facts and procedural history of the case are fully set forth in the petition and will not be repeated here. *See* Pet. at 3-24.

As relevant to the interests of amicus curiae, this case arises from an order by the respondent, the National Labor Relations Board ("NLRB" or "Board"), concluding that a unit of petitioners' employees including, among other employees, "[a]ll live-haul employees (chicken catching crews) employed at the processing facility of the [petitioners] located at Wilkesboro, North Carolina" was an appropriate collective bargaining unit. Pet. App. at A-167 - A-168. The Board's order on this point was not unanimous. Board Member Oviatt dissented because he found that petitioners' live-haul employees[2] are agricultural laborers and therefore not covered by the NLRA. *Id.* at A-187 - A-188.

[1] This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

[2] For purposes of this brief, the term "live-haul employees" refers to persons employed by integrated poultry producers as chicken catchers, forklift operators, and live-haul drivers.

The Court of Appeals for the Fourth Circuit enforced the NLRB's order, over the partial dissent of Judge Niemeyer. Like Board Member Oviatt, Judge Niemeyer concluded that petitioners' live-haul employees were not properly included in the bargaining unit because they are agricultural laborers excluded from the NLRA's coverage. *Id.* at A-60.

SUMMARY OF ARGUMENT

The question presented has divided the NLRB, the Fourth Circuit below, and the Courts of Appeals across the country. It is an important question going to the scope of the statute governing labor relations and directly affects hundreds of employers and thousands of employees throughout the Nation. This Court should grant certiorari to resolve the direct and irreconcilable conflict that has arisen among the Circuits in addressing that recurring question.

In enforcing the order issued by a divided NLRB, the divided Fourth Circuit below held that petitioners' live-haul employees were not agricultural laborers under the NLRA and thus were appropriately included in a collective bargaining unit. This decision, which follows decisions of the Court of Appeals for the Eighth Circuit, is in direct conflict with a decision of the Fifth Circuit (which is also binding in the Eleventh Circuit) and a decision of the Ninth Circuit. Those courts have held that live-haul employees *are* agricultural laborers and thus not covered by certain provisions of the NLRA. *See Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. Unit A 1980) (live-haul drivers and forklift operators), *reh'g denied*, 644 F.2d 34 (5th Cir. Unit A Apr. 1981); *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) (live-haul drivers). The Fourth Circuit's holding is also contrary to the statutory language of the

agricultural exemption, which clearly covers employees—such as the live-haul employees at issue here—who perform their work on a farm, catching, caging, loading, and transporting live chickens to storage for market in conjunction with the primary farming activity of raising poultry.

The conflict between the Fourth and Eighth Circuits, on the one hand, and the Fifth, Ninth, and Eleventh Circuits, on the other, covers the area of this country where most chickens are produced. In 1994, over 85 percent of the broiler chickens in this country were produced in the States within the Circuits comprising the split in authority. There is accordingly no need to let this important question "percolate" further in the lower courts. The overwhelming majority of live-haul employees and their employers are already subject to binding appellate authority on the question. The issue has been joined and has culminated in a sharp conflict among the Circuits. Employees for the same company performing the same tasks should not be treated differently under the national labor laws depending on the Circuit in which they happen to work. Competing poultry producers should not be at a competitive advantage or disadvantage depending upon the Circuit in which their operations are located. Workers engaged in the same tasks on chicken farms in Maryland and Georgia should be classified the same for purposes of the NLRA, but they are not. This Court should grant certiorari to resolve the conflict.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH CONTROLLING AUTHORITY IN THE FIFTH, NINTH, AND ELEVENTH CIRCUITS AS TO WHETHER LIVE-HAUL EMPLOYEES ARE AGRICULTURAL LABORERS EXEMPT FROM THE NLRA

The NLRA excludes from its definition of an "employee" covered by the Act any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). The definition of "agricultural laborer" under the NLRA is provided by the Fair Labor Standards Act ("FLSA"). *See Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977). Section 3(f) of the FLSA specifies that "agriculture" includes:

> farming in all its branches and among other things includes * * * the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. [29 U.S.C. § 203(f).]

The Fourth Circuit, in enforcing the NLRB order, concluded that petitioners' live-haul employees were not agricultural laborers. Pet. App. at A-52. In reaching this conclusion, the Fourth Circuit agreed with the Court of Appeals for the Eighth Circuit, which had previously held that live-haul drivers of a vertically integrated poultry producer were not agricultural laborers. *Id.* at A-50-A-51 (citing *NLRB* v. *Hudson Farms, Inc.*, 681 F.2d 1105, 1106 (8th Cir.), *cert. denied*, 459 U.S. 1069 (1982); *Valmac Indus., Inc.* v. *NLRB*, 599 F.2d 246, 247, 249 (8th Cir. 1979)).

The Fourth Circuit's decision below, however, directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077, 1081 (5th Cir. Unit A 1980), *reh'g*

denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981), which held that live-haul drivers and loader operators[3] of a vertically integrated poultry producer were agricultural laborers under section 3(f) of the FLSA.[4] The contrary holding of the Fifth Circuit in *Coleman* was expressly noted by both the majority and the dissenting opinions of the Fourth Circuit below. The majority did not even attempt to distinguish the holding in *Coleman*, instead simply declaring that "[w]e decline to follow" it and contending that the Fifth Circuit was insufficiently deferential to the NLRB. Pet. App. at A-52 n.4. The dissent specifically relied on the Fifth Circuit's opinion, and noted the conflict between that decision and the Eighth Circuit's decision in *Hudson Farms*. Pet. App. at A-60 - A-61.

The Fourth Circuit's decision below, insofar as it concerns live-haul drivers, also directly conflicts with the Ninth Circuit's decision in *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972). In that case the Ninth Circuit concluded that live-haul drivers of a vertically integrated poultry producer were agricultural laborers exempt from the NLRA. The court rejected the opposite position urged by the NLRB and specifically followed a prior decision from the Fifth Circuit that was a predecessor to *Coleman*, *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), noting that "[t]he NLRB has not demonstrated that we need create a conflict between the Circuits on this point." 471 F.2d at 21. Now, with contrary decisions from the Eighth and Fourth Circuits, the NLRB has its conflict.

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[3] The "loader operators" considered by the Fifth Circuit in *Coleman* perform the same duties as the forklift operators in the instant case. *Coleman*, 629 F.2d at 1079.

[4] The Fifth Circuit's precedent in *Coleman* is also binding on the Court of Appeals for the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), (en banc) (adopting as Eleventh Circuit precedent all decisions of the Fifth Circuit handed down before October 1, 1981).

The conflicting conclusions of the Circuits cannot be explained away on the ground that the courts looked to different authorities. There is accordingly no basis for hoping the courts might be reconciled on reconsideration, without the need for intervention from this Court. The Fourth, Fifth, and Eighth Circuits each looked to the statute and this Court's decision in *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), in considering the question presented.

In *Bayside*, this Court upheld an NLRB order that concluded that employees who trucked poultry *feed* from the premises of their *employer* (a vertically integrated poultry producer) to the premises of independent contract farmers who raised the chickens were not agricultural laborers. *Id.* at 303-304. The Courts of Appeals differ as to the impact of *Bayside* on the question whether the live-haul employees at issue here, who perform different tasks than the employees in *Bayside*, are agricultural laborers. The Eighth Circuit has held that the status of live-haul drivers (who truck live chickens from the contract farms to storage on the premises of the integrated poultry producer) was indistinguishable from the status of the feed carriers at issue in *Bayside*. *Valmac Indus.*, 599 F.2d at 249. The Fifth Circuit in *Coleman*, however, concluded that *Bayside* did not control the issue of whether live-haul employees (as opposed to feed carriers) were agricultural laborers. 629 F.2d at 1081.

Nor can the conflict be explained away by noting that the Fifth Circuit in *Coleman* was considering a case under the FLSA and not the NLRA. As discussed above, the NLRA does not define an "agricultural laborer," but rather depends on the definition provided in section 3(f) of the FLSA—the very statutory section interpreted by the Fifth Circuit in *Coleman*. In addition, although the Fifth Circuit in *Coleman*, unlike the Fourth Circuit below, was not considering an order of the NLRB, *Coleman*, 629 F.2d at 1081 n.4, there can be no question that—having

interpreted section 3(f) of the FLSA to include live-haul drivers and loader operators as agricultural laborers—the Fifth Circuit would reach the same conclusion if the issue arose under the NLRA. In either case the issue is governed by the same statutory language, and basic principles of *stare decisis* require the Fifth Circuit to interpret section 3(f) of the FLSA consistently, regardless of the position the NLRB may take in a later case. *See Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").[5] Indeed, the Fifth Circuit in *Coleman* expressly reaffirmed the validity of its holding in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), which "held that live haul truckers were agricultural workers exempt from coverage under the National Labor Relations Act," 629 F.2d at 1079 (footnote omitted), despite the contrary view of the NLRB.

Although the Ninth Circuit's decision in *Ryckebosch* predates this Court's decision in *Bayside* and is mentioned in *Bayside* as being in "apparent" conflict with the Court of Appeals decision affirmed in *Bayside*, 429 U.S. at 299 & n.4, it is still good and controlling law. The employees at issue in *Bayside* performed a different job than the employees in *Ryckebosch*—presumably the reason this Court described the conflict as only "apparent."[6] The

[5] The fact that the *Coleman* court's analysis would not be affected by the NLRB's contrary reading is confirmed by the fact that the holding in *Coleman* was based on "the plain language of the statute." 629 F.2d at 1079. No amount of agency deference can lead to a reading contrary to a statute's plain language. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986).

[6] The Fifth Circuit in *Coleman* also considered the effect of this Court's opinion in *Bayside* on its opinion in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), the case the

Bayside employees transported feed to chickens on contract farms, while the *Ryckebosch* employees transported live chickens from contract farms to storage for market. The difference is plainly pertinent under the statutory language. The raising of poultry is explicitly defined as agriculture under the FLSA (and, thereby, the NLRA), as is its "delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. § 203(f). Transporting feed to a farm, in contrast, does not fit within the statutory definition.

II. ACCORDING TO THE CLEAR LANGUAGE OF THE AGRICULTURAL EXEMPTION, CHICKEN CATCHERS, FORKLIFT OPERATORS, AND LIVE-HAUL DRIVERS ARE AGRICULTURAL LABORERS EXEMPT FROM THE NLRA

The Fourth Circuit below held that individuals employed by petitioners as chicken catchers, forklift operators, and live-haul truck drivers may properly be included in a collective bargaining unit under the NLRA. These employees work in teams[7] on farms of independent contract farmers who raise the broiler chickens owned by petitioners. The teams go to the farms at night, transported on flat bed trucks driven by the live-haul drivers. Once at the farm, the chicken catchers catch and cage the chickens. The forklift operator then places the cages

Ryckebosch court followed and which was cited in *Bayside* along with *Ryckebosch* as being in "apparent conflict" with the lower court opinion in *Bayside*. 429 U.S. at 299 & n.4. Like the Ninth Circuit in *Ryckebosch*, the Fifth Circuit in *Strain Poultry* was considering live-haul drivers, not feed drivers as in *Bayside*. In *Coleman*, the Fifth Circuit came to the conclusion that *Strain Poultry*'s holding as to live-haul employees was not overruled by this Court's decision in *Bayside*. *Coleman*, 629 F.2d at 1080. For the same reason, the Ninth Circuit's holding in *Ryckebosch* is still good law.

[7] Each team consists of one live-haul driver, one forklift operator, and about nine chicken catchers. Pet. App. at A-40 - A-41.

on the flat bed truck, which is driven by the live-haul driver to a storage area near petitioners' processing plant. The live-haul drivers also occasionally assist the chicken catchers in catching and caging the fowl. Pet. App. at A-58. *See also Coleman*, 629 F.2d at 1078 (such "operations are apparently typical of those prevailing in the poultry industry").

Under the plain language of the definition of "agriculture" in the FLSA, these employees are agricultural employees. The chicken catchers and forklift operators work "on a farm" doing tasks in conjunction with farming operations. The live-haul drivers are also clearly included in the definition of section 3(f) as persons performing the "delivery [of poultry] to storage or to market or to carriers for transportation to market."

This Court's decision in *Bayside* is not to the contrary. The employees at issue in that case did not perform their work "on a farm," nor did they transport poultry or other agricultural products to market or to storage for market. The Court explained that "[s]ince there is no claim that these drivers work 'on a farm,' the question is whether their activity should be regarded as work performed 'by a farmer.'" 429 U.S. at 301. In making this determination, this Court held that "the status of the [employees in question] is determined by the character of the work which they perform for their own employer." *Id.* at 303.

While that was true in *Bayside*, it is not true here. This Court in *Bayside* looked to the character of the employer's operations because it was considering whether the work in question was being performed "by a farmer." The statute, however, applies to practices performed "*either* by a farmer *or* on a farm." 29 U.S.C. § 203(f) (emphases added). If the work is performed "on a farm" and otherwise meets the criteria set forth in the statute, it makes no difference that the worker's employer may not be a farmer under the statute. The worker is still an agricultural laborer because of the nature of the work he performs "on a farm."

As this Court has held, the definition of "agriculture" provided by the FLSA includes two distinct branches. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762 (1949). The primary meaning of agriculture encompasses "farming in all its branches." *Id.* The secondary branch of the definition includes "any practices * * * which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Id.* at 763. Petitioners below conceded that their live-haul employees were not engaged in primary agriculture. Pet. App. at A-44. Petitioners' live-haul employees are nonetheless agricultural laborers because the tasks they perform "on a farm" are clearly "incident to or in conjunction with" the farming operations of the independent contract growers.

The NLRB reaches a contrary conclusion by arguing that "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." *See Bayside*, 429 U.S. at 302 n.9 (quoting *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973) (additional citations omitted)). Hence, to the NLRB, the character of the work performed by the employees at issue makes no difference, nor does the fact that they perform that work on a farm, because petitioners are integrated poultry processors and the chicks have left their premises to be raised. This analysis—upheld by the Fourth Circuit below—is contrary to the plain language of the statute, in that it focuses on whether the employer is a farmer and totally ignores that the agricultural exemption may also be triggered by the nature of the work performed by the employees "on a farm."

III. THE EXISTING CONFLICT AMONG THE CIRCUITS COVERS NEARLY ALL LIVE-HAUL EMPLOYEES AND EMPLOYERS IN THE COUNTRY AND IS RIPE FOR RESOLUTION BY THIS COURT

The stark conflict among the Circuits on the status of live-haul employees under the NLRA warrants this Court's attention. Under the ruling of the Eighth Circuit and the Fourth Circuit below, NBC members are required to bargain with units comprised of live-haul employees; in the Fifth, Ninth, and Eleventh Circuits, NBC members need not bargain collectively with these employees, because they have been characterized as agricultural laborers exempt from the NLRA. The Courts of Appeals that have addressed and disagreed on this issue have jurisdiction over the top six (and nine of the top ten) broiler producing States.[8] Over 85 percent of the broilers produced in 1994 were produced within the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits.[9] Put simply, we have heard from the Courts of Appeals that are likely to be heard from on this issue, and the result is a sharp conflict.

Accordingly, the existing split in authority between the Fourth and Eighth Circuits, on the one hand, and the Fifth, Ninth, and Eleventh Circuits, on the other, affects

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[8] *See* United States Department of Agriculture, National Agricultural Statistics Service, *Poultry Production and Value 1994 Summary* 5 (May 1995). The top ten States, in order of number of broilers produced in 1994, were as follows: (1) Arkansas, (2) Georgia, (3) Alabama, (4) North Carolina, (5) Mississippi, (6) Texas, (7) Maryland, (8) Delaware, (9) Virginia and (10) California. *Id.*

[9] In 1994, a total of 7,017.5 million broiler chickens were produced in the United States. *Id.* Of that number, over 2,715.1 million broilers were produced in States located in the Fourth and Eighth Circuits (where live-haul employees are not agricultural laborers), and 3,310.6 million broilers were produced in States located in the Fifth, Ninth, and Eleventh Circuits (where live-haul employees are agricultural laborers). *See id.*

an overwhelming majority of the live-haul employees in the country, on an issue of undeniable importance to those employees and their employers. The NLRA should not apply to some live-haul employees but not others, based simply on the happenstance of the Circuit in which the employees work. The operations of vertically integrated poultry producers span the conflicting Circuits, so employees of the same company performing the same tasks are now subject to different treatment under the national labor laws depending upon the State in which they work. At the same time, competing poultry producers may be at a competitive advantage or disadvantage, depending upon whether their operations are in a State in which they must bargain collectively with their live-haul employees. This Court should grant certiorari so that these employees can be dealt with in a uniform manner throughout the country.

The NLRB, through the Solicitor General, has previously explained why a conflict among the Circuits of the sort at issue here warrants this Court's attention. In acquiescing in certiorari in *Bayside*, the Solicitor General explained that the question presented was "a recurring one in the administration of the NLRA," that "there are serious practical objections to having a conflict in the circuits on this issue" (including the fact that "the conflict among the circuits furnishes a strong inducement for forum shopping"), and that "resolution of the issue would have a direct impact on cases arising under the FLSA * * * as well as on those arising under other statutes which refer to agricultural laborers or employees." Brief for Respondent, *Bayside Enterprises, Inc.* v. *NLRB*, No. 75-1267, at 9 & n.8 (citations omitted). All of these reasons apply even more strongly in this case, where the conflict is both sharper and broader than it was in *Bayside*.

CONCLUSION

For the foregoing reasons, and those in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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